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ABSTRACT

This pamphlet discusses how colleges and universities can protect themselves and their employees from liability for copyright infringement. The pamphlet outlines types of works that are copyrightable and notes that certain infringements of copyrights are excused under the doctrine of "fair use." The four factors in determining fair use are discussed, including purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used, and effect of use upon the potential market for or value of the copyrighted work. The pamphlet examines the role of the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals," which was developed by educational institutions, authors, and publishers. The application of copyright law to particular academic circumstances is then explored, including libraries, online databases and optical videodisks, performances, music, audiovisual works, commercial software, ad hoc anthology, and use of factual information. The pamphlet notes how to obtain copyright permission for published works and penalties for copyright infringement. Appendixes provide texts of the "Agreement on Guidelines" noted above, "Guidelines for Educational Uses of Music," and "Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes." The pamphlet concludes with 47 references to court cases, Congressional reports, books, and articles. (JDD)

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A Guide to Copyright Issues in Higher Education

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A Guide to Copyright Issues in Higher Education

The Copyright Act of 1976 grants to copyright owners the exclusive right to reproduce their works, prepare derivative works based upon them, distribute copies of them, perform them, and display them. Anyone who undertakes one of these acts without permission of the copyright holder has infringed the copyright, unless the act falls within one of the exceptions set forth in the statute. This means that many seemingly routine campus activities, such as duplicating, performing plays and other works, and copying computerized information may violate federal law.

The purpose of this pamphlet is to discuss how colleges and universities can protect themselves and their employees from liability for copyright infringement. Because copyright is an uncertain area of the law, definitive answers are not always possible. This pamphlet, therefore, sets forth some guidelines which will keep the use of copyrighted material within the law.

It should be noted at the outset that certain works are not protected by copyright. Works of the federal government, for instance, are generally not copyrightable unless they are commissioned works unrelated to the official duties of government. In addition, works published more than seventy-five years ago, and not subsequently updated, are no longer protected by the Copyright Act; such works are in the public domain.

Facts and ideas are also not copyrightable, but the manner in which an author expresses a fact or idea is. No one owns the life story of George Washington, for example, but nevertheless a biography of Washington is copyrightable. Distinguishing protected expression from unprotected ideas can sometimes be difficult since even paraphrasing can constitute infringement if the paraphrase is "substantially similar" to the original. On the other hand, use of names, places and the like, or summary of a scholar's theory is generally safe.

Also, in order for a work to be copyrightable it must contain some element of originality or

creativity, but this requirement does not necessarily demand novelty, ingenuity, or aesthetic merit. The author must have contributed something recognizably his own and not merely a trivial variation of something else.

A copyright is infringed when the exclusive rights of the copyright holder are violated. However, in an attempt to balance incentives for authors with the public need for information, the law excuses certain infringements of copyrights under the doctrine of "fair use." In fact, the legality of much campus copying is contingent on the notion of fair use. The issue of what constitutes fair use has been called the most troublesome in the whole law of copyright.

The Copyright Act specifies a four-factor test to determine whether a use of a work constitutes fair use. The four factors are (1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. What complicates the notion of fair use is that it must always be determined by use of the four-factor balancing test described in the statute.

In 1976, because of the difficulty of applying the statutory test, private groups representing educational institutions, authors and publishers developed the *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals* (the "*Agreement on Guidelines*"). These guidelines are admittedly restrictive and only represent the "minimum standards of educational fair use."[1] Two major educational organizations—the American Association of University Professors (AAUP) and the Association of American Law Schools (AALS)—refused to sign, endorse, or be bound by the *Agreement on Guidelines*. The AALS believed that the guidelines were too restrictive and that courts, not interest groups, should decide what constitutes fair use.

Also in 1976, representatives of music publishers and music teachers developed the *Guidelines for the Educational Uses of Music*. And three years later in 1979, representatives of educational institutions, copyright proprietors and creative guilds and unions developed the *Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes* (the "*Off-Air Guidelines*").

The three guidelines are reproduced in the Appendices. Anyone staying within these guidelines should be well within the bounds of fair use.

Fair Use Under the Copyright Act

While the *Agreement on Guidelines*, the *Off-Air Guidelines* and the *Guidelines for Educational Uses of Music* offer clear rules, they express only the minimum standards of educational fair use. If a college or university wishes to copy more than these guidelines allow, without first obtaining permission from the copyright owner, it must look to the four-factor test set forth in the Copyright Act, which is flexible but difficult to apply with certainty.

The First Factor: Purpose and Character of Use

The first factor examines the purpose and character of the use. Educational uses are preferred. As a result, the first factor is generally favorable to a finding of fair use by educational institutions, professors and students. If a bona fide educational purpose is established, then the burden of proof is on the plaintiff to show that some meaningful likelihood of future harm exists. Educational purposes, however, have not always mandated a finding of fair use. In *Encyclopedia Britannica Educational Corp. v. Crooks*,[2] for example, a court determined that a nonprofit educational institution could not make videotapes of copyrighted films and distribute them to public schools in a "highly organized and systematic program for reproducing videotapes on a massive scale."[3] Similarly, in *Wihtol v. Crow*,[4] a teacher and choir master who made 48 copies of plaintiff's

1. *Agreement on Guidelines*, introductory paragraph.

2. 447 F. Supp. 243 (W.D.N.Y. 1978).

3. Id. at 252.

4. 309 F.2d 777 (8th Cir. 1962).

song for use by students and choir members was held to have gone beyond fair use.

The Second Factor:
Nature of the Copyrighted Work

The second factor focuses on the nature of the copyrighted work—that is, whether the work is published or unpublished, fact or fiction. In general, it is much more difficult to establish fair use of an unpublished work than a published work, because the copyright owner is presumed to be particularly concerned with how the work is first presented to the public, and may in fact not want the work published at all. Since one policy of copyright law is to encourage the dissemination of ideas, copying a factual work is more likely to be fair use than copying a work of fiction.

The Third Factor:
Amount and Substantiality of Copying

The third factor takes into consideration the amount and substantiality of copying. The statute does not set a numerical or percentage limit; in fact the extent of permissible copying is often obscure. The Supreme Court has in one instance held the copying of 300 words from a book to be an infringement and in another instance held the copying of an entire work to be fair use.[5]

Even a small portion of a work may be deemed substantial, however, if the portion constitutes a central or critical part of the original work. Note that substantiality is measured relative to the original work, not the infringing work.

The Fourth Factor:
Effect of the Use of the Work

The Supreme Court has called the fourth factor—the effect of the use on the market for or the value of the work—the most important element of a fair use analysis.[6] The Court has stated that fair use is limited to copying by others which does not impair materially the marketability of the work which is copied.[7]

The Interdependence of the Four Factors

The four-factor test is difficult to apply because the factors are all interdependent. For example, the fourth factor is related to the third factor, in that the more substantial the copying, the more likely it is that copying will have an adverse economic effect on the copyright owner. Also, when the copying serves the purpose of advancing scientific research (the first factor), courts may allow broader discretion to the researcher on the amount of permissible copying (the third factor).

In *Williams & Wilkins Co. v. United States*,[8] for instance, a court ruled that although a library made 93,000 copies of articles in one year, its copying did not exceed fair use.[9] The case involved a commercial publisher of technical and scientific journals which sued the United States for copying done by the National Institute of Health and the National Library of Medicine. The N.I.H. had two subscriptions to each of 3,000 journals and copied articles upon request without inquiring into the reason for the photocopies. The court of claims held that "[t]he result of a flat proscription on library photocopying would be...that medical and scientific personnel would simply do without... many of the articles they now desire, need, and use in their work."[10]

On the other hand, in *American Geophysical Union v. Texaco Inc.*,[11] a court held that intermittent photocopying by individual scientists at Texaco (i.e., six articles in this particular case) was *not* fair use. Emphasizing that the scientists conducted their research primarily for the

5. *Compare Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) *with Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

6. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985).

7. *Id.* at 556-567, *quoting* 1 Nimmer, *Nimmer on Copyright*, § 1.10[D], at 1-87.

8. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court* (per curiam), 420 U.S. 376 (1975).

9. The court, however, emphasized that this library was a nonprofit institution devoted to advancing scientific research "untainted" by commercial gain. The court was also impressed that the library carefully made sure that copies were generally not more than 50 pages long, and that researchers did not receive more than one copy of an article.

10. *Id.* at 1357.

11. 802 F.Supp. 1 (S.D.N.Y. 1992).

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commercial gain of Texaco, and that practical licensing arrangements (such as those provided by the Copyright Clearance Center, discussed below) had become readily available since the *Williams* decision, the court found that scientific research would *not* be significantly hindered, because Texaco would ensure that its scientists obtained the articles needed for their work.[12]

Although the fourth factor has been considered by some courts to be the most important, other courts have emphasized different factors, depending upon the facts of the case. One commentator has noted that the four factors overlap so that any one factor is not critical to a court's ruling. "[T]he fact that defendant's purpose was to supplant plaintiff's market has properly been held to bear on both the first and fourth factors. Similarly, the fact that defendant's use had a commercial motive, or took a substantial portion of plaintiff's work, will also usually imply an injury to plaintiff's market."[13]

The Role of the Guidelines

An influential commentator predicted that the *Agreement on Guidelines* would be treated as part of the copyright statute itself.[14] Because of the uncertainty inherent in the four-factor test, this prediction has, in some cases, proved accurate. At least one federal appellate court, for example, has referred to the *Agreement on Guidelines* in making a fair use determination.[15] In addition, the United States Copyright Office has published a circular targeted at educators that quotes the *Agreement on Guidelines* as authority. In that circular, the objection to the *Guidelines* by the two Academic associations is only mentioned in a single sentence, without explanation. Many legal commentators also seem to assume that the *Agreement on Guidelines*, is the law.

Not surprisingly, therefore, several important out-of-court settlements have required defendants to copy only within the *Agreement on Guidelines*, absent permission from the publisher. The first two settlement agreements related to suits against copying services only. However, one was the result of a suit against professors and New York University (NYU), as well as a photocopy service.[16] Such agreements may now serve to "create a precedent for a narrow view of fair use and alert ...other copy centers and universities that photocopying more materials than the *Guidelines* allow may invite future actions."[17]

Because of the de facto status of the *Guidelines*, the safest course is for universities to abide by them. Certainly, the *Agreement on Guidelines* is not the law, and the statute itself probably allows more copying than the *Guidelines* suggest. But, going beyond the *Guidelines*—in ways described in the preceding section of this pamphlet—is heading into less clearly-defined areas of the law. Except in the context of their libraries, which usually fall within the special statutory protection described below, institutions could be vicariously liable for infringements committed by their employees in the course of their duties. For this reason, educational institutions should establish procedures to inform their employees of the requirements of copyright law and to discourage violations.

Application of Copyright Law to Particular Academic Circumstances

Libraries

Under Section 109 of the Copyright Act—the "first sale doctrine"—the owner of a particular copy of a copyrighted work has the right to determine the distribution of that copy. Thus, a college or university or its library may lend, resell or rent a book, periodical, record or videotape in its collection because the library owns it. It is also permissible for the library to institute a lending fee for works other than records. The fee for records may only cover administrative costs of the lending program.

12. *Id.* at 25.

13. 1 Goldstein, *Copyright*, § 10.2.2 at 213-214.

14. See 3 M. Nimmer, *Nimmer on Copyright* § 13.05(E)(3)(a), at 13-96 (1984).

15. *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983).

16. *Addison-Wesley v. New York University*, 1983-1984 Copyright L. Dec. (CCH) ¶ 25,544 (1983). The settlement in the NYU case does, however, allow the four-factor test to be used if a faculty member has sought and been denied permission to copy.

17. Note, "Fair Use of the Guidelines for Classroom Copying? An Examination of the Addison-Wesley Settlement," 11 *Rutgers Computer & Technology L. J.* 111 (1985).

Fair use can govern what libraries may copy. However, the copyright statute in Section 108 also outlines procedures that libraries and archives can follow to avoid liability when copying sections of books and articles or to avoid vicarious liability when their employees or students violate the copyright statute. Notably, Section 108 provisions are *in addition to and not in lieu of* any fair use determination; copying by libraries that does not fall under Section 108 may still be permissible under fair use.

Libraries will be protected by Section 108 if they fulfill the criteria specified by Section 108(a), namely, that

> (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
>
> (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
>
> (3) the reproduction or distribution of the work includes a notice of copyright.

Even libraries in profit-making medical clinics and other for-profit institutions may qualify if they make their collections "open or available."[18] Once a library qualifies as a Section 108(a) library, it must also satisfy the other criteria of Section 108.

A qualifying library may make individual copies in the instances described below, provided neither the library nor its employees know or have reason to know that the copying is systematic, or that it is being used to substitute for a subscription to or purchase of the work.

What a Library May Copy for Itself. A library which qualifies under Section 108(a) may copy unpublished works of any sort, including photographs, motion pictures and sound recordings, solely for the purpose of preservation and security or for deposit for research use in another library or archive which makes its collection open or available. Such copies may only be in facsimile form. They may not be translated into "machine-readable" language for storage in a computer database.

18. At least one court, however, has rejected such a claim. *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992).

A qualifying library may also copy in facsimile form any sort of out-of-print published work in order to replace a damaged, lost, deteriorating or stolen copy if the library has reasonably, but unsuccessfully, attempted to replace the work at a fair price from "the trade," including reprint houses and out-of-print sources.

What a Library May Copy for Its Patrons. A library which qualifies under Section 108(a) may reproduce one article or other contribution to a copyrighted collection or periodical issue, or a small part of any other copyrighted work, for a patron under certain conditions. A qualifying library may also copy all or a substantial portion of a copyrighted work for a patron under the same conditions if the library determines that it cannot obtain a copy at a fair price. The conditions which must be satisfied are as follows: (1) The exemptions do not apply to musical, pictorial, graphic, sculptural or audiovisual works, including motion pictures, but they do apply to news programs. (2) The library making the copy must not have any notice that the patron will use the copy for any purpose other than private study, scholarship or research. (3) The copy must become the property of the user. (4) The library must place a warning of copyright where the orders are placed.

Library Reserve Room Copying. The fair use considerations in the reserve room are closer to the ones governing classroom use than the more expanded standards for single copying for teachers. Basically, the library reserve shelf "functions as an extension of classroom readings or reflects an individual student's right to photocopy for his or her personal scholastic use."[19] If the library copies the materials for students, it should adhere to the *Agreement on Guidelines.*

Photocopying by Patrons. The steps that libraries must follow to avoid vicarious liability, when their patrons personally copy articles and books at library-owned copying machines, are not cumbersome. Basically, Section 108(f)(1) of the Copyright Act requires posting of a notice at the machines, which must read as follows:

19. M. Reed, *The Copyright Primer for Librarians and Educators* 21 (1987).

NOTICE
WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

Downloading and Printing from On-Line Databases and CD-ROMs

Libraries may also be vulnerable to vicarious liability for their patrons' downloading and printing of copyrighted materials from on-line databases and CD-ROMs. Just as when a patron takes an article or a book to a photocopier, a patron who prints out text accessed by means of computer, or who downloads such material onto a disk or hard drive, makes a copy of that material.[20] Therefore, downloading and printing of electronically-stored, copyrighted materials must be analyzed under the fair-use standard described above.

Given that there is yet to be any case law defining the boundaries of fair use in this context, it is unclear whether or to what extent universities will be vicariously liable for downloading and printing by their library patrons. To minimize any such liability, libraries should post a clearly visible notice similar to the one required by Section 108(f)(1) of the Copyright Act, printed above, in any location where on-line services or CD-ROMs are used. Moreover, universities with campus-wide computer networks, over which students, faculty and staff can access on-line materials from remote locations, should consider adding a Section 108(f)(1) notice to their student and employee manuals, or entering such a notice into the computer network itself, so that remote users will see the notice *before* accessing any on-line services.

Finally, short of limiting their patrons' ability to download and print altogether, university libraries can implement some sort of program to monitor the number of electronic copies made and to pay for any such copies. Some universities, for example, have participated in an experimental Billing and Royalty Tracking program (BART), in which each page of material entered onto a CD-ROM is encoded, so that each print-out can be recorded and debited from a debit card with which the user initiates the system.[21]

Performances

Public performance of a copyrighted work may also constitute copyright infringement. A performance that takes place in a school will generally be considered a public performance. Section 110 of the Copyright Act, however, permits public performance of copyrighted works under certain circumstances. The statute distinguishes between dramatic works and nondramatic works, grouping musical *performances* —but not musicals—with the latter. (It should be noted that musicals, such as *The Sound of Music*, would fall under the category of dramatic works.)

Dramatic Works. The following is the only exception to copyright infringement for public performance of dramatic works: (1) When a performance takes place in the course of a face-to-face teaching activity—i.e., instructional performances and displays that are not transmitted; and (2) it is in a nonprofit educational institution; and (3) it is conducted in a classroom or similar place (such as a library) devoted to instruction, and (4) in the case of an audiovisual work, when the copy (e.g., film or videotape) is lawfully made.

To perform, according to Section 101 of the statute, is "to recite, render, play, dance, or act

20. Indeed, some commentators have argued that a patron using these new technologies makes a copy, or publicly displays the electronic copy, simply by *accessing* such text. Ginsburg, "Reproduction of Protected Works for University Research or Teaching," 39 *Journal of the Copyright Society*, 181, 212 (1992); Jensen, "Is the Library Without Walls on a Collision Course with the 1976 Copyright Act?" 85 *Law Library Journal*, 619, 621 (1993).

21. Ginsburg, Reproduction of Protected Works for University Research or Teaching," 39 *Journal of the Copyright Society*, 181, 213 (1992).

it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." If the four criteria of this exception are not met, a performance of a dramatic work would constitute copyright infringement.

Nondramatic Works. Rules governing the performance of *nondramatic* literary or musical works are less restrictive than those governing dramatic works. In addition to the exemption discussed above, performances of nondramatic works at nonprofit educational institutions may be (i) transmitted to other classrooms and to handicapped persons who are unable to be present in classrooms, if the performance and the transmission are part of the instructional program, or (ii) open to the public if the performance is not broadcast, the performers are not compensated, there is no admission charge, any proceeds go to educational purposes, and the copyright owner does not object in writing at least seven days before the performance.

It must be noted that these limited exemptions do not affect an author's exclusive right to dramatize or adapt his work. For example, "a performer could read a nondramatic literary work aloud under Section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form."[22] Furthermore, the purpose for which a performance is given may be significant:

> performances in a series of broadcasts on the development of American literature would be exempt as, probably, would performances in the course of a single broadcast devoted to a critical analysis of a work of a single American author. But reading from that author's work to entertain, rather than to educate students about the author's life or writing style, would not be exempt.[23]

Music

The use of music at educational institutions may raise several issues under copyright law. First of all, when music is performed live, the performance will be governed by the rules discussed in the preceding section. When pre-recorded music is played before a group, there is not only a performance of the musical work but also of the particular recording. Under copyright law, however, the owner of a copyright in a musical *recording*, as distinct from the underlying *composition*, does not have the exclusive right to perform the recording publicly. Therefore, when pre-recorded music is performed, only the performance of the underlying composition need be analyzed under the statutory provisions governing performances to ensure compliance with copyright law.

On the other hand, the owner of a copyright in a musical recording does have the exclusive right to reproduce the recording. Therefore, when pre-recorded music is copied, for example by making a tape of a song on a compact disc, the exclusive rights of both the owner of the copyright in the recording and the owner of the copyright in the composition may be infringed.

As mentioned above, there are negotiated guidelines similar to those for copying books and periodicals which apply to educational uses of music. Although with copying music, as with copying anything else, a fair use determination may be made, a university will probably not be liable for infringement if it stays within these minimum standards of fair use.

Audiovisual Works

Showing Videotapes. The rules governing the showing of copyrighted videotapes are the same as those governing any other copyrighted performance. In order to show videotapes in classes, the screening must conform to the exceptions of Section 110(1) for a dramatic work. The law, then, limits the use of videos to classroom settings in conjunction with face-to-face instruction, as in the case of any performance.

The rules become more complicated in the library, where screenings do not coincide with "face-to-face teaching activities." In this case, videos may be viewed as non-public performances. The problems derive from the ambiguity of what constitutes a public performance. Although the boundaries of "public performance" have not yet been tested, a screening in a private library carrel would probably not count as a

22. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 45, 83 (1976).

23. 1 Goldstein, *Copyright*, § 5.8.1 at 624.

public performance and would be allowed regardless of the purpose for the viewing. Probably, individuals and very small groups may be permitted to view a videotape in a study carrel or viewing room.[24] Certainly a group of any significant size could only view a video in the library if the screening is in conjunction with face-to-face teaching activities. This follows by analogy to the classroom-use rules. Therefore, showing videos before large groups for purely entertainment purposes would not qualify as fair use even in a university library.

Copying Television Programs Off the Air for Classroom Use. Like the *Agreement on Guidelines* discussed earlier, the *Off-Air Guidelines* represent only the minimum standards for proper fair use. Unlike the *Agreement on Guidelines*, which have become de facto law, the *Off-Air Guidelines* were created before *Sony Corp. of America v. Universal City Studios* [25] was handed down by the Supreme Court. That case involved home recording and, in particular, the vicarious liability of Sony Corporation for infringement perpetrated by customers who purchased the company's VCRs. The language of the decision places a heavy burden on the plaintiff to prove economic damage, and mere time-shifting of television programs was held not to have caused any harm to program owners. While *Sony* dealt with taping at home, its logic would likely extend to taping by educational institutions as well.

For example, the *Off-Air Guidelines* require that a broadcast taped off the air by a non-profit educational institution must be erased 45 days after the date of recording. There is no concrete basis for this arbitrary number of days. In fact, if a teacher tapes a program for a single later viewing with her students, it should not matter how long she delays the screening. As Justice Stevens put it, "the time-shifter no more steals the program by watching it once than does the live viewer."[26] In *Encyclopedia Britannica*,[27] the defendants, on the other hand, were found to have infringed the copyright when they retained videotapes of television broadcasts for up to 10 years and showed them repeatedly. While 45 days seems an arbitrarily short length of time for fair use, 10 years with multiple plays is clearly a violation of that doctrine because it fails to meet the fourth factor of the four-factor test—effect on the market for the work. If, however, a recording causes no economic harm and its purpose is educational in nature, it would probably be within fair use.

The following Guidelines are based both on the *Off-Air Guidelines* and the *Sony* decision:

1. Off-the-air recordings may be used only once by individual teachers in the course of "time-shifting" the program in order for it to be seen in the class. After the program is seen once, it should be erased.

2. The off-the-air recordings should be shown in classrooms and similar places devoted to instruction.

3. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

4. Off-the-air recordings need not be used in their entirety, but they may not be altered from their original content. They may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

Use of Commercial Software

Protecting computer software presents unique problems for universities and university libraries where students or faculty members have access to university-owned equipment or software. Users are often tempted, for example, to copy a program onto their own disks for use on a different system, or perhaps to use at home. Often it is more convenient for users to have their own copy of a program formatted for the particular application that they need. These

24. However, the Third Circuit in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), and *Columbia Pictures Industries v. Aveco Inc.*, 800 F.2d 59 (3d Cir. 1986), held that a commercial establishment which rents private viewing rooms to members of the general public for individual screenings of video cassettes is, in fact, giving public performances for a profit. However, hotels that offer pay cable movies have been found to be exempt, because hotel rooms are considered private places. *Columbia Picture Industries v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989). The justification seems to be that a hotel room is a temporary domicile, while a private video room is not. Moreover, the purpose of the video establishments in *Redd Horne* and *Aveco* were to make money off the viewing of video casettes.

25. 464 U.S. 417 (1984).

26. *Id.* at 450, n. 33.

27. *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982).

scenarios and others like them involve possible infringement of the copyright in the software.

Software Licenses. Most computer software is licensed rather than sold outright. Many of the commercial software packages have what have been called "Shrink-Wrap" licenses which stipulate that the customer agrees to the terms of the license by tearing the plastic wrapping of the software package. It is unclear whether these contracts are binding, since there is very little case law to date on point.

For universities, these licenses can become particularly complicated.

> [T]he question of who has accepted the terms of such licenses is very problematic in a situation in which a faculty member requests a particular piece of software through his department chair, who, in turn, has a secretary complete a requisition which is then sent to the institutional purchasing office. By the time the software reaches the faculty member who ordered it, or even a central computing facility, it has been paid for and accepted by the institution; but, no license has been accepted because the license is still sealed in the plastic-wrapped box containing the software.[28]

In some cases, where the software involved is for use on a mainframe, or if it is customized, the university will sign an institutional license specifically drafted for that institution. However, in the case of commercial software used on personal computers, this step is often omitted.

Assuming that these contracts are binding, it is important to consider the limits generally imposed by software licensing agreements. The most common limitations on use are

- Restriction of use to a single CPU;
- Restriction on making additional copies of the software or accompanying documentation;
- Restriction on modifying or altering the software, including incorporating it into any other software;
- Restriction on disassembly.[29]

Note that even if a licensing agreement is unenforceable, the copyright owner will possess most of these rights as a matter of law. Each of the limitations is discussed below.

Does a School Need to Have a Different Version of a Program for Each Station? Many software licenses restrict the use of software to a single computer. From the terms of the license it might be assumed that the law requires one license per machine. This creates problems if the university owns 10 computers and only 5 word processing programs. If a student wants to use the word processing program, the license may require that she do so in conjunction with one particular machine. In this situation, it is likely that as long as an institution ensures that the number of software copies in use at any one time is the same as the number of licenses that it holds, the university can avoid litigation.

Universities Should Not "Network" Software Without Permission. "Networking" refers to any of a variety of methods by which computers may be interconnected. Depending on the type of network involved, there may be a potential for copyright infringement. Generally networking is not permitted through licensing agreements. It also is probably not allowed under Section 117, which only allows copying of software if the copying is an essential step in using the program or is solely for archival purposes. Although copying software to a hard disk is not in itself infringement, were such copying to foster multiple simultaneous uses of the software, it would be outside the spirit and probably the letter of Section 117, which only clearly permits the use of one copy of the software by one person at a time.

Backup Copies Are Permissible. The statute also specifies that a copy may be made "for archival purposes" as long as that copy is destroyed when the possession of the original ceases. The back-up is intended to be used only if the original is damaged. Even if a licensing agreement forbids making a back-up copy, this part of the licensing agreement would probably be invalid because it would be superseded by Section 117. Colleges and universities should not, however, make copies of software documentation, because most licensing agreements do not allow it, and the Copyright Act only allows archival copies of the software itself.

Modification of Commercial Software. Section 117 allows computer software owners to modify their programs for certain limited purposes. The

28. Gemignani, "A College's Liability for Unauthorized Copying of Microcomputer Software by Students," 15 *Journal of Law and Education* 421, 429 (1986).

29. *Id.* at 428.

status of a no-modification clause in a software license may depend upon whether the owner of the program is the user or the software manufacturer. If the user is a mere licensee, then the terms of the license will probably govern. However, one court has held that even if the licensing agreement is valid, enhancements to a program could be made without infringing copyright.[30] The judge wrote: "the court does not believe that plaintiff's right to improve or enhance its products is exclusive." He reasoned that

> [o]n the one hand, allowing sophisticated software users to enhance copies of copyrighted programs they have purchased eliminates the need to choose between either buying the latest version of a program or possibly infringing the program's owner's copyright. At the same time, allowing such enhancements to be used only in-house preserves the market for improvements made by the copyright holder.[31]

However, if a company modified a program so as to market it to third parties, the modification would probably not be allowed.

This area of the law is still unresolved, but modifications of software may nevertheless be allowed for educational purposes.

Actions an Educational Institution Can Take to Limit Vicarious Liability for Software Copying. Whether it is a licensee or an owner, an institution has notice that the software it uses is copyrighted, and it has an obligation not to be negligent in protecting the copyright. In the context of computers Section 108 is inapplicable, so there is no statutory safe harbor to protect institutions from liability as contributory infringers. By analogy, libraries which do not qualify under Section 108(a) could be liable for lending books where photocopy machines are available, although dicta suggest they would be immune. Therefore, a university should take steps to protect itself from liability as a contributory infringer. In particular, it should probably (1) have clearly-defined internal policies; (2) where possible have carefully negotiated agreements with software vendors; and (3) have computing practices that discourage illicit copying.

30. *Foresight Resources Corp. v. Pfortmiller*, 719 F. Supp. 1006 (D. Kan. 1989).

31. *Id.* at 1010.

The university should also institute and enforce penalties against students who disobey its policies. Moreover, the university should familiarize those who use its computer facilities with the policy. When software is loaned, it should be labeled as copyrighted material. It would also be prudent to place warning notices on the hardware similar to those a library must place on photocopying machines pursuant to Section 108.

Creation of Ad Hoc Anthology

Often when a textbook does not exist on a specific subject, a professor will create his or her own *ad hoc* "anthology" by copying articles and creating a collection. This is one of the most common forms of copyright infringement and publishers have sued photocopy centers that created these anthologies without prior approval.

Recently, in *Basic Books, Inc. v. Kinko's Graphics Corp.*,[32] the first such case to go to trial, a court held a copy center to have violated both the four-factor test of fair use and the *Agreement on Guidelines* by copying excerpts from numerous books and collecting them in a packet which was sold to students. The court stated, however, that although the Guidelines specifically prohibit the creation of *ad hoc* anthologies, such compilations may not always be improper and must be evaluated under the four-factor test.

In the *Kinko's* case, the court found only the second factor of the four-factor test—the nature of the copyrighted works—to favor the defendant. This factor, however, was outweighed by the other three factors, all of which the court held to favor a finding of unlawful copying. Although an educational institution which makes *ad hoc* anthologies using its own facilities would not be operating a nationwide, for-profit photocopying organization, as was the copy center in *Kinko's*, the case indicates that even university photocopying would probably be held to be beyond the bounds of fair use in most cases.

The *Kinko's* decision is likely to compel photocopy centers and university reserve rooms to monitor more carefully the materials they are

32. 758 F. Supp. 1522 (S.D.N.Y. 1991).

asked to reproduce. Therefore, a professor who is planning to hand out a significant quantity of copyrighted material in a particular course, which, taken as a whole, might constitute an anthology, should obtain permission for the use of *each* copyrighted work, including those which, standing alone, could otherwise be copied under the *Agreement on Guidelines*.

Use of Factual Information

As noted above, facts themselves may not be copyrighted; however, a collection of facts may be copyrightable as a compilation if the creator of the collection demonstrates some originality in choosing, grouping or organizing the facts. The Copyright Act defines a compilation as "a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[33]

The leading case on the copyrightability of compilations of factual data is *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*,[34] a 1991 decision of the Supreme Court concerning copyright in a telephone directory. In that case the defendant, publisher of a regional telephone directory who admitted using over 1,000 entries from the plaintiff telephone company's directory, was held not to have infringed plaintiff's copyright because the entries were facts not organized or selected in any original way.

The case indicates that the only elements of a factual compilation for which an author may claim protection under copyright law are those elements which the author in fact created—such as the organization or selection of the facts—not the facts themselves. An alphabetical listing of all telephone subscribers in a community lacks sufficient originality to be protectable. The court explicitly rejected the theory, adopted by some lower courts, that the effort expended by the creator of a factual compilation is protected under copyright law even in the absence of originality.[35]

33. 17 U.S.C. § 101.

34. 111 S. Ct. 1282 (1991).

Professors, researchers and students, therefore, may use facts contained in a copyrighted work without infringing the copyright as long as they do not appropriate elements of the work which are original, such as a particular selection, coordination or arrangement of the facts.

Miscellaneous

How To Obtain Copyright Permission for Published Works

If the proposed reproduction of a copyrighted work does not fall under fair use or any of the other exceptions described here, then one must obtain permission to make a copy.

The same day the 1976 Act went into effect, the Copyright Clearance Center (CCC) was created by a group of publishers. The CCC created a "Transactional Reporting System" that requires member publishers to print a publisher's consent to make copies, and its fee, on the first page of any article or book chapter. The user is then responsible for making periodic payments to the CCC for all copies that exceed fair use. After deducting an administrative fee, the CCC distributes payments to the publishers whose works were copied.[36]

For those publications not registered with the CCC, the following information should be placed in a letter to the publisher requesting permission to copy:

1. Title, author and/or editor, and edition of materials to be duplicated.
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material.
3. Number of copies to be made.
4. Use to be made of duplicated materials.
5. Form of distribution (classroom, newsletter,etc.).
6. Whether or not the material is to be sold.
7. Type of reprint (ditto, photography, offset, typeset).

35. Use of factual information may be limited under certain circumstances by other applicable law, such as patent law or state unfair competition law.

36. The CCC also has a second program, the Annual Authorizations Service, which audits the user's photocopy activity and appoximates the number of times the user copies works from particular publishers. The user pays an annual license fee based on these audits.

Penalties for Infringement

Section 504 of the Copyright Act describes the penalties for infringing a copyright. The law states that the "copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."[37] Instead of actual damages and lost profits, a plaintiff may elect to claim statutory damages for an infringement, which may be set at $500 to $20,000 "as the court considers just."[38]

Statutory damages may be increased up to $100,000 if the infringement is found to be willful. However, if the plaintiff cannot prove that the infringer was aware or had reason to believe that his or her acts constituted an infringement of copyright, then the court may reduce the award of statutory damages "to a sum of not less than $200." However,

> [t]he court shall remit statutory damages in any case where the infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107, if the infringer was an employee or agent of a nonprofit educational institution, library, or archives...which infringed by reproducing the work in copies or phonorecords.[39]

"It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff."[40] Therefore, in many cases, the plaintiff would have difficulty obtaining statutory damages against universities.

Conclusion

The following questions should be asked to determine if a particular use of a work constitutes fair use:

1. Is the use for the purpose of non-commercial education, science or research? If this first factor is established, the burden shifts to the plaintiff to prove that the use was not fair.

37. 17 U.S.C. § 504(b).

38. 17 U.S.C. § 504(c).

39. 17 U.S.C. § 504(c).

40. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 45, 163 (1976).

2. Is the copyrighted work published, unpublished, fact or fiction? Greater deference is given to published and to nonfiction works.

3. Is the amount copied a substantial part of the original work? A single sentence of one work may be deemed substantial, while a much greater portion of another work may not be deemed substantial at all. The test hinges on whether the part copied was "of critical importance to the work as a whole and taken by the infringer in order to save the time and expense incurred by the copyright owner."

This factor is dependant upon factor 2. Taking larger sections of non-fiction, published works is more tolerated.

4. Does the copying impair materially the market for, or value of, the copied work? If it does, the copying is probably not fair use.

These four factors must be balanced, with the most important issue being whether the copying impairs materially the market for or value of the copied work. Without a showing of actual damages, courts have been hard pressed to find infringement.

Because general counsel cannot oversee all reproduction that occurs in a university's facilities, many institutions require their constituencies to follow the bright-line rules set forth in the various guidelines for educational copying. The Copyright Act provides a more flexible test for fair use under which more uses of a work are permitted than under the various guidelines. The four-factor test, however, involves greater risk because its flexibility leads to uncertainty about the precise extent of permissible copying in specific situations. Therefore, when members of the academic community wish to make copies that exceed what is permitted by the guidelines, it is undoubtedly a good policy to consult with legal counsel.

If a college or university reasonably uses either the guidelines or the four-factor test to approve copying which a court subsequently determines is not fair use, it is not liable for statutory damages. As long as an institution believes and has reasonable grounds for believing that the copying is fair, its penalty for infringement could not exceed the legitimate price of permission to copy.

Appendix A

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

With Respect to Books and Periodicals
March 19, 1976

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of the guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill [subsequently enacted as 17 U.S.C. § 107]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, provided that:

A. The copying meets the tests of brevity and spontaneity as defined below; and

B. Meets the cumulative effect test as defined below; and

C. Each copy includes a notice of copyright.

DEFINITIONS

Brevity

(i) Poetry: (a) a complete poem if less than 250 words and if printed on not more than two pages, or (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in (i) and (ii) above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph].

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety; Paragraph (ii) above notwithstanding, such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in (ii) and (iii) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals].

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works of excerpts therefrom are accumulated or reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

Appendix B

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

April 30, 1976

[Preamble is the same as *Agreement on Guidelines*, above]

A. Permissible uses

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance, provided purchased replacement copies shall be substituted in due course.

2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

BEST COPY AVAILABLE

Prohibitions

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

Appendix C

GUIDELINES FOR OFF-AIR RECORDING OF BROADCAST PROGRAMMING FOR EDUCATIONAL PURPOSES (1979)

(1) The guidelines were developed to apply only to off-air recording by non-profit educational institutions.

(2) A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable transmission) and retained by a non-profit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after a date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

(3) Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. "School days" are school session days —not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions—within the forty-five (45) calendar day retention period.

(4) Off-air recordings may be made only at the request of, and used by, individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

(5) A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

(6) After the first ten (10) consecutive school days, off-air recording may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

(7) Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

(8) All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.

(9) Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

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